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No. 88-1939

IN THE

Supreme Court of the United States

October Term, 1988

NEW ENGLAND NEWSPAPERS, INC.
d/b/a THE PAWTUCKET EVENING TIMES,
Petitioner,

v.

PAUL J.M. HEALEY, M.D.,
Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Rhode Island

BRIEF *AMICI CURIAE* OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, NATIONAL ASSOCIATION OF BROADCASTERS, NEWSLETTER ASSOCIATION, RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION, AND SOCIETY OF PROFESSIONAL JOURNALISTS IN SUPPORT OF PETITIONER

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New England Newspapers, Inc.
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Paul J.M. Healey, M.D.,
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On Petition for a Writ of Certiorari
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Brief Amici Curiae of The Reporters Committee For Freedom of the Press, National Association of Broadcasters, Newsletter Association, Radio-Television News Directors Association, and Society of Professional Journalists In Support of Petitioner

INTEREST OF AMICI CURIAE

Amici curiae are five organizations that collectively represent a broad spectrum of print and broadcast journalists who gather and disseminate news and opinion about issues of on-going public controversy.

These amici have a profound interest in this case. They believe that the decision below, if permited to stand, will have far-reaching implications for journalists around the country, not only in Rhode Island, because it will permit the punishment of the republication of opinion included in a neutral report of an issue of substantial local concern.

Amici have written permission from both parties to file this brief. Copies of their letters have been filed with the clerk in accordance with U.S. Supreme Court Rule 29.

Amici are:

The Reporters Committee for Freedom of the Press, a voluntary, unicorporated association of working reporters and editors dedicated to defending the First Amendment and freedom-of-information interests of the news media and public. The Reporters Committee has provided representation, legal guidance and research in virtually every major press freedoms case litigated since 1970.

The National Association of Broadcasters, organized in 1922, a nonprofit incorporated trade association comprised of more than 5,000 radio stations, more than 900 television stations, and the major commercial broadcasting networks. NAB's members cover, produce, and broadcast the

news to the American people. NAB seeks to preserve and enhance its members' ability to freely disseminate information concerning the activities of government and other matters of public concern.

The Newsletter Association represents 850 publishers of newsletters and specialized information services. The Association's members publish more than 2,000 newsletters on a wide variety of subjects.

The Radio-Television News Directors Association, a professional association of electronic journalists. It has more than 2,500 members who gather, edit and disseminate news and other public affairs information carried by the nation's broadcast stations and cable television systems.

Society of Professional Journalists, a voluntary, not-for-profit organization of nearly 20,000 members. The Society is the largest and oldest organization of journalists in the United States, representing every branch and rank of print and broadcast journalism.

STATEMENT OF THE CASE

Amici adopt the statement of the case provided by the Petitioner in its petition for a writ of certiorari to the Supreme Court of Rhode Island.

SUMMARY OF THE ARGUMENT

In its opinion below, the Rhode Island Supreme Court has penalized a newspaper for attempting to fairly and neutrally report both sides of a controversial local matter. In doing so, it has trespassed on the ''breathing space'' for protected speech mandated by the First Amendment.

Whether under a theory of ''fair report'' or so-called ''neutral reportage,'' the courts have reasoned that the press should be afforded the freedom to dispassionately report newsworthy charges

and opinions without assuming responsibility for them. If the news media are to continue to fulfill their historic function of informing the public on the issues of the day, accurate reports of beliefs and opinions of participants in such controversies must be protected.

In addition, the court below imposed a penalty on the newspaper, at least in part, for failing to include all possible facts within its knowledge, even though the article as a whole accurately reported both sides of the dispute. News accounts of past events are necessarily selective, and under the First Amendment, the choices of what to leave out, as well as what to include, must be left to writers and editors.

ARGUMENT

The Rhode Island Supreme Court Decision Unconstitutionally Denies the Press and Public the Requisite First Amendment Protection When Reporting Neutrally Both Sides of an Issue of Substantial Local Concern.

In our society, the role of informing the people about the controversies of the day -- whether they be of great or slight moment, or of local or national importance -- is a task constitutionally committed to the press. For that information to be of value, it must be communicated in a timely fashion while the matters are still the topic of public discussion and concern. As one prominent journalist recently observed, "newspapers are writing only rough

drafts of history . . . the best that reporters and editors could do with the information available under the given circumstances."[1] In the marketplace of ideas, yesterday's news fetches no price because it is of so little value in contributing to contemporaneous debate.

In the instant case, the Rhode Island Supreme Court has penalized the type of reporting that is disseminated day in and day out across this nation.[2] Here,

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[1] Address by Benjamin Bradlee, Wake Forest University Graduation, May 12, 1989 (quoted in Publishers Auxiliary, at 15, col. 1 (June 12, 1989)).

[2] A vital component of news coverage consists of reporting accusations made by and against participants in various matters of public concern. See, e.g., Mathews, Chappaquiddick, Newsweek, July 3, 1989, at 52-53 (periodical report of Chappaquiddick grand jury foreman's accusations that police and prosecutors engaged in cover-up aimed at protecting Senator Edward M. Kennedy);

the local newspaper attempted to report neutrally both sides of a matter of substantial local concern, a "paradigmatically 'routine newspaper reporting techniqu[e].'" Florida Star v. B.J.F., 57 U.S.L.W. 4816, 4820 (June 21, 1989) (quoting Smith v. Daily Mail Publishing Co., 443 U.S. 97, 103 (1979)).

As this Court recently reaffirmed: "Our profound national commitment to the free exchange of ideas, as enshrined in the

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2 Continued
Matthews, Hearns Jabs Sugar with Steroid Talk, Newsday, June 9, 1989, at 168 (newspaper report of boxer's accusations that opponent used steroids prior to their championship fight); Valvano-Corruption, Associated Press, Jan. 7, 1989 (newswire report of accusation in upcoming book that college basketball coach ran a corrupt program); Kaufman, Bush ads draw charges of racism: Some say it's just politics, Boston Globe, Oct. 23, 1988 (newspaper report of accusations of aide to Democratic presidential nominee that Republicans are running racist ads); Maxa, The Senator & The Girl, Washingtonian Magazine, Nov. 1988, at 105 (periodical report of three women's

First Amendment, demands that the law of libel carve out an area of '"breathing space"' so that protected speech is not discouraged." Harte-Hanks Communications, Inc. v. Connaughton, 57 U.S.L.W. 4846, 4854 (June 22, 1989) (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974)). In the instant case, the lower court has trespassed upon that constitutionally mandated "breathing space." Indeed, if the present judgment, which includes $250,000 in punitive damages, is allowed to stand, it "would invite 'self-censorship and very likely lead to the suppression of many items

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2 Continued
accusacions that U.S. Senator made sexual advances toward them); Espo, Reagan Calls Dukakis "An Invalid": Dukakis Says He's "Healthy Guy", Associated Press, Aug. 3,1988 (newswire report that President Reagan accused Democratic nominee of being "an invalid" in response to question about nominee's mental health).

that. . . should be made available to the public.'" Florida Star v. B. J. F., 57 U.S.L.W. at 4818-19 n. 7 (quoting Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 496 (1975)).

In Harte-Hanks Communications, Inc. v. Connaughton, this Court acknowledged that it has not yet squarely addressed whether the press can constitutionally be penalized when it fairly and neutrally reports both sides of an issue of substantial public concern. Id. at 4847 n. 1 (discussing application of "neutral reportage doctrine" in proceedings before district court); Id. at 4856 (Blackmun, J., concurring) (discussing potential applicability of "'neutral reportage' defense"). The propriety of penalizing such expression is especially suspect in constitutional terms where, as here, a newspaper merely republishes the beliefs and opinions of one of the

protagonists in the underlying controversy.[3] "[A] vast amount of what is published in the daily and periodical press purports to be descriptive of what somebody *said* rather than of what anybody *did*." *Time, Inc. v. Pape*, 401 U.S. 279, 285 (1971) (emphasis in original). If the press is to continue to fulfill its historic

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[3] *See* *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974). The rationale for protecting an opinion expressed by an individual or in the news media is compelling. Opinion cannot be false. It is neither offered nor interpreted as fact, and thus is not susceptible to verification. *Id.*; *Lewis v. Time, Inc.*, 710 F.2d 549 (E.D. Cal. 1983). Indeed, in previous decisions, even the Rhode Island Supreme Court has recognized that the "opinion" privilege protects allegations made by a defendant even though they exaggerate the seriousness of an alleged offense. *See* *DeCarvalho v. daSilva*, 414 A.2d 806, 815 (R.I. 1980) (physician's criticism of Honorary Portuguese Counsel for Rhode Island in Portuguese periodical for using his influence to assist illegal immigration constitutes protected opinion).

function, such reporting cannot constitutionally be subject to sanction; it must be protected to ensure that the people are fully informed as to the view of those who have joined the debate on the issues of the day.

In an effort to divine the appropriate degree of constitutional protection applicable to expression such as that at issue in this case, the courts have grappled with various doctrines and defenses. For example, when determining the actual malice question, some courts have considered whether the defendant fairly attempted to provide the public with the views of both sides to an issue of public concern. In Greenbelt Coop. Publishing Ass'n v. Bresler, 398 U.S. 6, 7 (1970), the plaintiff challenged news reports of "several tumultuous city council meetings" where "many members of the community freely

expressed their views." In particular, plaintiff challenged news articles reporting that certain speakers at the meetings had characterized the plaintiff's negotiating position as "blackmail." Id. In rejecting plaintiff's libel claim, this Court noted that the articles "were accurate and truthful reports" of what had been said by the persons who participated in the public debate on an important local issue. Id. at 12. Accordingly, the Court ruled that the newspaper had not even departed from the "'standards of investigation and reporting ordinarily adhered to by responsible publishers,'" "much less" the "knowing use of falsehood or a reckless disregard of whether the statements made were true or false." Id. (quoting Curtis Publishing Co. v. Butts, 388 U.S. 130, 155 (1967) (opinion of Harlan, J.)).[4] The Court concluded that the newspaper was simply performing

"its wholly legitimate function as a community newspaper when it published full reports of these public debates in its news columns." Id. at 13.

When confronted with similar situations, other courts have attempted to determine whether the expression before them is entitled to constitutional protection under the so-called "neutral reportage doctrine." For example, in Edwards v. National Audubon Society, Inc., 556 F.2d 113 (2d Cir.), cert. denied, 434 U.S. 1002 (1977), the court was confronted with a news article that republished the names of

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4 See Harte-Hanks Communications, Inc. v. Connaughton, 57 U.S.L.W. at 4849 ("an extreme departure from professional standards . . . cannot provide a sufficient basis for finding actual malice").

prominent scientists and university professors who were accused by a respected amateur ornithologist of being "paid liars" for the pesticide industry and, in particular, the producers of DDT. Id. at 116. At the time, a public controversy raged regarding the hazardous effects of DDT on large portions of the nation's bird population. Id. at 120. After noting that the reporter had in "good faith elicited both sides of the story to the best of his ability," Id. at 118, the court concluded that the article was "the exemplar of fair and dispassionate reporting of an unfortunate but newsworthy [occurrence]," Id. at 120.

Stating that the fact the accusations were made was what made them "newsworthy," the court reasoned:

> We do not believe that the press may be required under the First Amendment to suppress newsworthy statements merely because it has serious doubts regarding their truth. Nor must the press take up cudgels against dubious charges in order to publish them without fear of liability for defamation.

Id. Accordingly, the court concluded that the "public interest in being fully informed about controversies that often rage around sensitive issues demands that the press be afforded the freedom to report such charges without assuming responsibility for them." Edwards, 556 F.2d at 120; accord, Medina v. Time, Inc., 439 F.2d 1129, 1130 (1st Cir. 1971).[5]

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5 A number of state and federal courts have relied on the neutral reportage doctrine in circumstances similar to the instant case. See, e.g., Barry v. Time,

Whatever analysis is employed, in the present case the challenged expression cannot constitutionally be subject to

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5 Continued
Inc., 584 F. Supp. 1110, 1122-28 (N.D. Cal. 1984) (court found balanced report of college basketball star's accusation that former head basketball coach was involved in illegal recruiting payments constitutionally protected by privilege of neutral reportage); April v. Reflector Herald Inc., 15 Media L. Rep. (BNA) 2455, 2457-58 (Ohio Ct. App. 1988) (court found accurate and disinterested report of sheriff's charges that sheriff's office employee was fired for stealing amidst controversy over unauthorized settlement of former employee's age discrimination case protected by neutral reportage privilege); Wade v. Stocks, 7 Media L. Rep. (BNA) 2200, 2201-02 (Fla. Cir. Ct. 1981) (court found news article that impartially related local businessman's charges about City Commissioner's character and qualifications for office protected by neutral reportage privilege); Krauss v. Champaign News Gazette, Inc., 59 Ill. App. 3d 745, 746-48, 375 N.E. 2d 1362, 1363-64 (Ill. App. 1978) (court found article reporting assertions by Assistant State's Attorney about problems with plaintiff's juvenile rehabilitation program within "ambit of the privilege of neutral reportage"). By the same token, other courts even in some of the same jurisdictions have declined to afford

financial penalty. The announcement in early June 1980 that two longtime and popular employees of the Pawtucket-Central Falls YMCA were being forced to resign received virtually daily coverage in the Pawtucket area. The June 25 article in The Evening Times was only one of many the newspaper ran concerning the issue.

Had Gerald Lampinski collapsed and died of a heart attack in his home, Respondent Dr. Healey would have had nothing to

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5 Continued
constitutional protection to "neutral" reporting. See, e.g., Dickey v. CBS, Inc., 583 F.2d 1221, 1225-26 (3d Cir. 1978) (court refused to find broadcast of congressman's accusation that plaintiff accepted bribe protected by neutral reportage privilege); Newell v. Field Enters. Inc., 91 Ill. App. 3d 735, 756-58, 415 N.E.2d 434, 451-52 (Ill. App. 1980) (court expressly declined to adopt neutral reportage privilege).

do with his well-being, and Lampinski's death would have been unrelated to the YMCA controversy. But the facts of this case are otherwise. Lampinski was an established YMCA supporter, he had helped found a YMCA branch in the area and he vehemently opposed the resignations. He collapsed during a protest of those resignations only a few hundred yards from the YMCA board meeting being chaired by Healey from which he had just recently been evicted. Healey's decision not to check personally on Lampinski's condition at the time when he first became aware of the collapse, and indeed, not until many hours later, left him open to criticism not only from Lampinski's sons, but from others in the community as well.

The fact that Evening Times reporter Edward Gaulin could have provided the sons with additional information regarding their

father's collapse because he assisted in administering cardiopulmonary resuscitation is no guarantee that the sons' criticism of Healey would have been any different. In fact, the sons' comments might have been even harsher had they known that a reporter assisted in providing their father CPA, instead of a highly trained physician who was nearby, but who chose not to interrupt a board meeting to go to their father's aid.

More importantly, it is undisputed that the challenged article is an accurate and neutral report of the positions of those on both sides of the issue. On the one hand, the article accurately reported that the Lampinski family had "expressed anger at the way their father was treated by the board" in that he was "ordered to leave the board meeting, and the agenda of the meeting was taken from him." Appendix to Petition for Writ of Certiorari, 44a (hereinafter

referred to as "App."). The article also reported that the family was "angry because they feel Lampinski should have been given early attention by either a doctor or a paramedic at the board meeting" and that "Dr. Paul J. Healey is Y president and was at the meeting when Lampinski collapsed." Id.

On the other hand, the article reported that "Lampinski was being given cardiopulmonary resuscitation," and that "Healey was informed that Lampinski had collapsed, an ambulance had been called and that persons at the scene were treating him." Id. at 45a. It also reported that Healey was told that "'the situation was well in hand and already being taken care of.'" Id. In closing, the article stated that "Smith took offense at any implication that either Healey or board members had been lax" and quoted Frank Smith, a Healey supporter,

who said: "'the accusation being made is false, the accusation that Dr. Healey knew something and didn't do anything.'" Id.

Given the nature of the expression at issue in this case, this Court should grant certiorari to make clear that the First Amendment prohibits the imposition of liability on the press when it republishes the opinion of one of the protagonists in the course of accurately reporting both sides of a public dispute. As this Court recently recognized, "such elucidation is particularly important in the area of free speech" especially since continuing "[u]ncertainty as to the scope of the constitutional protection can only dissuade protected speech." Harte-Hanks Communications, Inc. v. Connaughton, 57 U.S.L.W. 4854.

As Justice Blackmun has recently emphasized, the "form and content" of the

article at issue are highly relevant to the issue of actual malice. Harte-Hanks Communications, Inc. v. Connaughton, 57 U.S.L.W. 4856 (Blackmun, J., concurring). Thus, a reviewing court should consider whether the protagonist's "description of the events was presented as truth rather than as contested allegations," because such differences in presentation "are relevant to the question whether the publisher acted in reckless disregard of the truth: presenting the content of . . . [the] allegations as though they were established fact would have shown markedly less regard of their possible falsity." Id. at 4857. In this case, the expression at issue was clearly not presented as established fact, but rather was simply offered to the reader as the opinion of a family member who was described as both "upset" and "angry."

In addition, in finding actual malice, the Rhode Island Supreme Court relied, in part, on the fact that The Evening News did not print all the facts within its knowledge, some of which would, in the court's view, have "dispelled the defamatory implications." App. 10a. Accordingly, liability was premised not only upon "what was actually printed," but also upon "what was left unprinted." Id.[6]

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6 Among the information that the court chastized the newspaper for not publishing was the fact that Gaulin was present at the scene and had personal knowledge of the events. App. 11a. Yet the press' daily coverage of matters of public interest is largely dependent on reporters' presence at the scene of newsworthy events without the reporters' presence being revealed in the news reports. Indeed, most news reports, whether based on the firsthand knowledge of the reporter or on information obtained from other sources, are written in the third person.

Decisions affecting the words that appear in an article are a necessary component of the editorial process. But when the courts make these decisions, it severely inhibits the exercise of First Amendment rights. See Janklow v. Newsweek, Inc., 788 F.2d 1300, 1304 (8th Cir. 1986) (en banc); Lauderback v. American Broadcasting Co. Inc., 741 F.2d 193 (8th Cir. 1984), cert. denied, 469 U.S. 1190 (1985).

Every news story reflects choices about what to leave out, as well as what to include. Janklow v. Newsweek, Inc., 788 F.2d at 1306. For that reason,

> Courts must be slow to intrude into the area of editorial judgment, not only with respect to choices of words, but also with respect to inclusions in or omissions from news stories. Accounts of past events are always selective, and under the First Amendment the decision of what to select must almost

> always be left to writers and editors. It is not the business of government.

Id.

In the instant case, the newspaper is being penalized, at least in part, for failing to relate certain additional information to the Lampinski sons about their father's collapse. This directive by the court below is even more invidious in some respects than instructing The Evening Times what to print. It is tantamount to dictating how a journalist must conduct an interview or prepare a story. Such interference directly contravenes the First Amendment.

CONCLUSION

The Rhode Island Supreme Court decision in this case conflicts with the First Amendment's protection of publication of opinion to promote the free exchange of ideas. Furthermore, it denies the news

media the right to neutrally report both sides of an issue of substantial local concern. By dictating how such stories are to be crafted, the court has forced the press to abdicate editorial control over what is published concerning controversial matters.

Therefore, amici respectfully urge this Court to grant certiorari in this case, and to reverse the decision below.

Respectfully submitted,

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